Supreme Court, U.S.
FILED
MAY 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1610

In the Supreme Court of the United States

OCTOBER TERM, 1988

DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION,
Petitioners,

vs.

DOUG JAGER and WILLIAM JAGER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Petitioners Douglas County School District and Douglas County Board of Education ("the School District") respectfully submit this Reply Memorandum.

The Jagers' opposing brief misstates the question presented by the petition, and raises arguments in opposition to the petition that are incorrect and misleading.

I. The Decision of the Eleventh Circuit in This Case Is in Direct Conflict With the Decision of the Sixth Circuit in Stein v. Plainwell Community Schools.

The Jagers' statement that "[t]here is . . . no conflict with *Stein*"[1] is simply wrong. There is a direct conflict in both the reasoning and the result.

The Sixth Circuit held in *Stein* that the practice of having ceremonial invocations at high school graduation ceremonies does not violate the Establishment Clause.[2] Invocations in that Circuit are permitted if they are "nonsectarian" and "nonproselytizing."[3]

The Eleventh Circuit held in this case that a plan permitting ceremonial invocations at high school football games does violate the Establishment Clause. Invocations in this Circuit are prohibited even if they are nonsectarian and nonproselytizing.

The two Circuits have thus interpreted and applied the Establishment Clause in diametrically opposite ways.[4]

The conflict in result in inescapable and complete: school districts in the four states of the Sixth Circuit can continue to have ceremonial invocations at extra-

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1. Brief of Respondents at 12.

2. *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987).

3. *Id.* at 1409-1410.

4. The Jagers do not contend that the constitutional analysis is any different for invocations at graduation ceremonies and athletic events, and the Eleventh Circuit made no such distinction. The Eleventh Circuit thought *Stein* was wrongly decided and disagreed with the Sixth Circuit's reasoning. App. A12.

curricular events while school districts in the three states of the Eleventh Circuit cannot.[5]

There can hardly be a more direct conflict. The School District respectfully requests the Court to grant certiorari to resolve this conflict.

II. The Decision Is Not "Fact-Specific" and Instead Has Broad Application to Ceremonial Invocations Given at All Public Community Events in the Eleventh Circuit.

The Jagers implicitly recognize that the question of the "constitutional limits on the accommodation of ceremonial invocations at public events" is worthy of resolution by this Court.[6] Their attempt to minimize the cert-worthiness of this case by arguing that the Eleventh Circuit's decision affects only *this* School District is quite misleading and is belied by the court's opinion.[7]

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5. District and state courts have differed on this subject as well. *Compare Graham v. Central Community School District of Decatur County*, 608 F. Supp. 531 (S.D. Iowa 1985), and *Kay v. David Douglas School District No. 40*, 719 P.2d 875 (Or. Ct. App. 1986), *rev'd as moot*, 738 P.2d 1389 (Or. 1987), *cert. denied*, 108 S. Ct. 740 (1988) (holding that invocations are unconstitutional) *with Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974); *Goodwin v. Cross County School District No. 7*, 394 F. Supp. 417 (E.D. Ark. 1973); *Wood v. Mt. Lebanon Township School District*, 342 F. Supp. 1293 (W.D. Pa. 1972); and *Wiest v. Mt. Lebanon School District*, 320 A.2d 362 (Pa. 1974) (holding that invocations are constitutional).

6. Brief of Respondents at 10.

7. The "facts" relied on by the Jagers in their brief relate only to the prior practice of having ministers as invocation speakers. This practice was abandoned before the lawsuit was filed and was replaced by the equal access plan.

For example, the Jagers fail to point out that the district court's findings of an impermissible purpose and effect refer only to the *prior practice* and not the equal access plan. *See* App. A57 ("One of the defendants' purposes . . . *was* motivated

(Continued on following page)

The Eleventh Circuit's holding has broad application. It would apparently prohibit invocations at all extracurricular school events in the Eleventh Circuit, including not only athletic events but also graduation ceremonies and similar events even though attendance at these extracurricular events is completely voluntary and the student-teacher relationship is not implicated. Ceremonial invocations would be prohibited in the Eleventh Circuit:

— regardless of the neutral and unobjectionable content of the invocations;

— regardless of the existence of legitimate secular purposes; and

— regardless of the fact that there is no proselytizing and no attempt to convert the audience.

The decision thus significantly affects every school district in the Eleventh Circuit.

Indeed, under the Eleventh Circuit's reasoning, ceremonial invocations at public community events completely outside the school setting would similarly be prohibited. Holding that "the state cannot employ a religious means

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Footnote continued—

. . ." and "One of the effects of the *prior practices* in regard to invocations *was* . . .") (emphasis added). The district court expressly held that the equal access plan *is* constitutional on its face. App. A60.

Furthermore, these "facts" regarding the prior practice are irrelevant to the *facial constitutionality* of the equal access plan, which was the only issue before the court. In *Bowen v. Kendrick*, ... U.S. ....., 108 S. Ct. 2562, 2569-2570 (1988), this Court emphasized that in reviewing the *facial constitutionality* of a statute, a court should not look beyond the face of the statute.

The Jagers do not (and indeed cannot) contest the facial neutrality of the equal access plan.

to serve otherwise legitimate secular interests,"[8] App. A14, the Eleventh Circuit concluded that the School District violated the Establishment Clause because it could have preceded its football games with "a secular inspirational speech" instead of an invocation. App. A13. At *any community event*—school-related or not—a ceremonial invocation could arguably be replaced by a secular inspirational speech. Under this rationale, any ceremonial invocation would violate the Establishment Clause.

In focusing solely on the religious aspect of invocations,[9] the Eleventh Circuit further demonstrates that its decision applies to ceremonial invocations at all public events. An invocation invariably has a religious component as well as a secular component. No invocation—whether or not given in a school setting—can withstand this scrutiny.

In summary, the Jagers' attempt to trivialize the importance of this case must be rejected.

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8. As explained on pages 11-13 of the School District's petition, this Court has expressly rejected the Eleventh Circuit's reasoning. *See Lynch v. Donnelly*, 465 U.S. 668, 681 n.7 (1984).

The Jagers apparently recognize the incorrectness of the Eleventh Circuit's reasoning on this point. *See* Brief of Respondents at 14.

9. As pointed out on pages 10-11 and 14-16 of the petition, this is also contrary to the teaching of *Lynch*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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